

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

DAVID GRIMMETT,)
)
)
 Plaintiff,)
)
)
v.)
)
KNIFE RIVER CORPORATION -)
NORTHWEST, an Oregon)
corporation, dba KNIFE RIVER)
an MDU RESOURCES COMPANY,)
)
)
 Defendant.)
)
)
No. CV-10-241-HU
OPINION & ORDER

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1 - OPINION & ORDER

1 HUBEL, Magistrate Judge:

2 Plaintiff David Grimmett brings this employment discrimination
3 case against his former employer defendant Knife River Corporation.
4 Specifically, plaintiff brings a race discrimination claim under 42
5 U.S.C. § 1981, and a supplemental state claim for intentional
6 infliction of emotional distress (IIED).

7 Defendant moves for summary judgment on both of plaintiff's
8 claims. Both parties have consented to entry of final judgment by
9 a Magistrate Judge in accordance with Federal Rule of Civil
10 Procedure 73 and 28 U.S.C. § 636(c). I grant the motion in part
11 and deny it in part.

12 BACKGROUND

13 Defendant Knife River Corporation is in the construction
14 business and operates from multiple locations in Oregon providing
15 aggregate, asphalt, building materials, construction services, and
16 ready mix concrete for customers in both the public and private
17 sectors.

18 Plaintiff is African-American and began working for defendant
19 in July 2005 as a general laborer on a paving crew out of
20 defendant's Coffee Lake location, south of Portland. Because the
21 job was too physically demanding, plaintiff requested and received
22 a transfer to defendant's Waterview Sand & Gravel location. He was
23 a groundsman, with his primary duties keeping the machinery and
24 equipment at the site clean. He also drove a haul truck.
25 Typically, there were eight to ten employees on site during his
26 shift. All but one of the other employees were Caucasian,
27 including Jeremy Russell, plaintiff's supervisor, and Dennis
28 Druery, the site superintendent.

1 I. Incidents at Waterview

2 Plaintiff worked at Waterview from August 14, 2005, until
 3 December 2006. During that time, he worked with a Caucasian
 4 employee named Steve Wetten. Wetten used the term "nigger" around
 5 plaintiff, stating it a little less frequently than every week.
 6 Pltf Depo. at pp. 43-44. Wetten admits he used the word "nigger"
 7 around plaintiff in the workplace. Wetten Depo. at pp. 10, 17.
 8 Plaintiff explained that Wetten used the term "nigger this" or
 9 "nigger that" and at times he would apologize, but then the next
 10 week he would say the same thing again. Id. at p. 43-45. Wetten
 11 referred to rocks in the pit or the road as "little nigger heads."
 12 Id. at p. 44; see also Wetten Depo. at pp. 10-11 (used term "nigger
 13 heads" when referring to big rocks within a roadbed, "explaining"
 14 that this is a term used for over 100 years by road builders).

15 Separately, Wetten referred to malfunctioning equipment as
 16 "nigger-rigged" and "African ingenuity." Wetten Depo. at p. 17.
 17 When he first used the term "nigger-rigged," plaintiff complained
 18 to Wetten about it, and according to Wetten, two or three weeks
 19 later, Wetten used the term "African ingenuity." Id. at pp. 17-18;
 20 see also Druery Depo. at p. 14 (heard Wetten use term "African
 21 ingenuity" the day after hearing him use term "nigger-rigged").

22 On a separate occasion, plaintiff heard a different Caucasian
 23 employee at Waterview, Wes Henshaw, state over the radio that
 24 "Dave's black ass is going to work today." Pltf Depo. at p. 47.
 25 Plaintiff states that he confronted Henshaw about it. Id. Wetten
 26 testified that Henshaw used the word nigger around plaintiff.
 27 Wetten Depo. at pp. 11-12.

28 Plaintiff states that Wetten's references to "nigger" went on

1 for about a year, and at some unspecified point, plaintiff reported
2 Wetten's frequent use of the word "nigger" to Russell, his
3 supervisor, and site superintendent Druery. Pltf Depo. at pp. 43-
4 44. Plaintiff testified that Druery and Russell themselves
5 overheard Wetten's use of the word and to plaintiff's knowledge,
6 they never did anything about it and Wetten received no discipline.
7 Id. at pp. 43-44.

8 Druery states he was present when Wetten used the term
9 "nigger-rigged" to describe how Wetten had repaired or rigged a
10 piece of equipment. Druery Depo. at p. 12. Plaintiff was also
11 present. Id. According to Druery, as soon as Wetten used the
12 term, Druery "instantly" looked at plaintiff, plaintiff was looking
13 at Druery, and Druery told Wetten "outside." Id. Wetten went
14 outside where Druery said, "bluntly, . . . make no mistakes about
15 it, that if I ever heard him say anything like that again, that he
16 would just be gone." Id. at pp. 12-13. Druery testified that
17 plaintiff had not complained to him about Wetten before this
18 incident and did not complain after the incident. Id. at p. 13.
19 Plaintiff did not complain to Druery about other employees making
20 racial slurs. Id. at p. 14. Druery also stated that Russell never
21 told Druery that plaintiff had complained to him about Wetten
22 making racial slurs. Id. at p. 13.

23 According to Druery, the very next day after telling Wetten he
24 would be gone if he said anything like that again, Wetten used the
25 term "African ingenuity." Id. at p. 14. Although there were other
26 people present, Druery could not remember one way or the other
27 whether plaintiff was one of them. Id. Druery does not recall
28 saying anything to Wetten because he did not think he had to. He

1 states: "I don't even think I had to say anything. I just looked
 2 at him and I was like, seriously. . . . I might have told him to
 3 shut up or something. I don't know." Id. at p. 15. There is no
 4 written documentation about the incident. Id.

5 Plaintiff worked at Waterview until he went on medical leave
 6 in December 2006. He returned to work in February 2007 and was
 7 assigned work as a loader operator at defendant's Linnton ready mix
 8 site.

9 II. Incidents at Linnton

10 The crew at Linnton consisted of six or seven other employees
 11 during plaintiff's shift, including one African-American¹, one
 12 Hispanic, and at least one woman. When plaintiff first started
 13 there, the site superintendent was Jim Dumolt. Dumolt retired in
 14 the spring of 2007 and was replaced by Kermit Achenbach who became
 15 plaintiff's immediate supervisor.

16 According to plaintiff, on or about May 18, 2007, Achenbach
 17 had asked plaintiff to use the loader to put up a sign. Plaintiff
 18 got the loader and approached the batch office, stopped the loader,
 19 and got out to ask Achenbach and Joe Robertson, a co-worker who was
 20 the senior ready mix driver at Linnton, to help him put the sign
 21 into the loader. Pltf Depo. at pp. 77. Plaintiff apparently
 22 neglected to set the parking brake, and the loader bumped into the
 23 batch office. Id. at pp. 77-79. Plaintiff got out of the loader
 24

25 ¹ The other African-American employee at Linnton was Jarvis
 26 Campbell, who is also a plaintiff in a case against defendant.
 27 That case, pending in this Court and assigned civil case number
 28 CV-10-242-HU, is a companion case with the instant case, but has
 not been consolidated. They remain separate cases and I treat
 them separately.

1 was approaching the office when he overheard Achenbach and
 2 Robertson speaking and refer to him as a nigger. Id. at pp. 77-80.
 3 He indicated that it could have been either one of them, or both,
 4 using the word. Id. at p. 80. Plaintiff received a verbal warning
 5 from Don Kincaid, defendant's Metro Ready Mix Operations Manager,
 6 regarding his causing the loader to bump into the entry deck of the
 7 batch office. Deft Exh. 7 at p. 2.

8 Plaintiff states that one of his co-workers at Linnton, Eric
 9 Branson, told plaintiff that he (Branson) had overheard Achenbach
 10 and Robertson use the word nigger in reference to plaintiff and
 11 Campbell. Pltf Depo. at pp. 86-87, 96. In addition, two other co-
 12 workers, Denni Chrisler and Sam Castillo, told plaintiff that they
 13 heard Achenbach or Robertson use derogatory words towards plaintiff
 14 and Campbell. Id. at p. 96. Castillo states that he overheard
 15 Achenbach say, "[t]hat stupid fucking nigger, can't back it up, the
 16 truck," in reference to Campbell trying to back up one of the
 17 trucks in the dark. Castillo Depo. at p. 29.

18 On a separate occasion, another of plaintiff's Linnton co-
 19 workers, Susan Erwin, used the term "nigger-rigged" when referring
 20 to the "really, really old" condition of the plant and the fact
 21 that it would break down. Erwin Depo. at p. 26.² At the time,
 22

23 ² In the summary judgment record in the Grimmett case, the
 24 record is unclear as to when this happened. The record developed
 25 in the Campbell case, however, indicates that this incident
 26 occurred in September 2009, after Grimmett was terminated.
 27 However, as I announced at oral argument, because the cases are
 28 not consolidated and are pending here as separate, individual
 cases, I consider each record separately. Thus, for purposes of
 the summary judgment motion in Grimmett, because there is no
 evidence of when Erwin made the comment and I construe all
 inferences in favor of plaintiff, I consider the comment to have

1 Erwin was with Peter Nontavarnit, John Ratcliff, and Campbell.
 2 Ratcliff is African-American. Plaintiff was not there.

3 Immediately after using the term, Erwin apologized to Campbell
 4 and Ratcliff told her not to worry about it. Id. at p. 30. The
 5 record is unclear as to how management became aware of Erwin's
 6 comment, but at some point Brian Gray, defendant's Metro Vice-
 7 President - General Manager, called and talked to her about it and
 8 determined, apparently, that it was an "accident." Id. at p. 27.
 9 Erwin assured Gray it would never happen again. Id. It is unclear
 10 when this call occurred.

11 Nontavarnit heard Robertson use racial slurs such as
 12 "wetback," "spic," and "beaner," a handful of times. Nontavarnit
 13 Depo. at pp. 34-35. He also heard Achenbach use the term "beaner"
 14 as well. Id. at p. 35. Other drivers would make comments to
 15 Nontavarnit, who is Asian, about "Asian drivers." Id. at pp. 38-
 16 39.

17 Nontavarnit testified that he heard Achenbach make comments
 18 about wanting to get rid of plaintiff. Id. at p. 32. According to
 19 Nontavarnit, Achenbach complained that plaintiff wasn't pulling his
 20 weight and he wanted to get rid of him. Id. at pp. 32-33.
 21 Nontavarnit denied that Achenbach had a specific plan in mind. Id.
 22 Nontavarnit further stated that he heard Robertson state that he
 23 also wanted to get plaintiff terminated or make him quit. Id. at
 24 p. 36. Nontavarnit could not recall how many times he heard
 25 Robertson make such comments. Id.

26 In August 2007, plaintiff contacted defendant's Human
 27

28 been made during plaintiff's tenure at Linnton.

1 Resources Director Sarah Stevens (formerly Sarah La Chappelle), to
2 complain about the racial name calling. Pltf Depo. at p. 102.
3 Approximately two weeks later, Stevens interviewed plaintiff,
4 Achenbach, and others. Id. at pp. 102-03.

5 Stevens's written investigation report suggests that plaintiff
6 contacted her on August 27, 2007. Pltf Exh. 9 at p. 12 (Depo. Exh.
7 36). She spoke with plaintiff, Achenbach, Robertson, and Campbell.
8 Id. Plaintiff had identified Robertson as the "main instigator,"
9 but also indicated that Achenbach was involved. Id. In the
10 "relevant facts" section of her report, Stevens noted that both
11 plaintiff and Campbell did not like the manner in which Robertson
12 bossed them around. Id. They characterized him as disrespectful
13 and a jerk. Id. Stevens noted that an individual that plaintiff
14 and Campbell refused to name to Stevens, had told both plaintiff
15 and Campbell that this person had heard Robertson, in the office,
16 on the phone with his wife, refer to plaintiff as a "lazy nigger."
17 Id. Plaintiff and Campbell had promised this individual
18 confidentiality so they refused to name the person to Stevens. Id.
19 Achenbach denied ever using the word nigger. Id. So did
20 Robertson. Id. Stevens noted that in her interviews, "[s]everal
21 references to racial terms were brought up by different people, as
22 used in 'joking,' with others such as 'spick' [sic] and 'crout'
23 [sic] and 'this black man' etc. None of these were made or in
24 reference to [plaintiff]." Id.

25 As for her conclusions, the only conclusion Stevens made
26 regarding the use of racial slurs was that "[t]he culture at
27 Linnton uses racial terms and it is unacceptable, however, there is
28 not a pattern of racial comments or otherwise harassing or

1 discriminatory activity going on at Linnton with regard to
2 [plaintiff]." Id.

3 Her recommendations were: (1) Gray and Kincaid were to meet
4 with Achenbach and "lay out formal expectations of him as a
5 supervisor and his obligations to ensure a work environment free of
6 harassment and discrimination of any kind"; (2) "[p]lan and conduct
7 supervisory training on the topic of harassment (sexual and racial
8 and otherwise respectful behaviors)"; (3) "[r]eassign work
9 assignments such that [Robertson] is not in a supervisory role";
10 and (4) "[e]nsure [plaintiff] understands his job responsibilities
11 include plant maintenance, cleanup and labor. Ensure [plaintiff]
12 knows that we do not tolerate harassing or discriminatory activity
13 and that if he witnesses or experiences anything of this nature, to
14 bring it to the attention of management." Id. In describing these
15 recommendations in deposition, Stevens noted that none of the
16 "outcomes" was "disciplinary exactly." Stevens Depo. at p. 29.

17 Stevens believes Kincaid met with the crew, as noted in her
18 second recommendation, to make sure that there should be no
19 comments or joking about race, sex, or religion. Stevens Depo. at
20 p. 28. She was not present for the meeting, however. Id.

21 Plaintiff testified that he subsequently called Stevens, maybe
22 twice, he could not recall, and left her a message, but he never
23 heard back from her. Pltf Depo. at p. 112. At some point, he
24 contacted Gray and left a message for him. Id. at pp. 112-13. He
25 could not remember when this was, but it was after he had left a
26 message with Stevens. Id. He indicated that it took Gray three
27 weeks to get back to him. Id.

28 Plaintiff explained that he called Gray because "there wasn't

1 nothing moving and it was just business as usual." Id. at p. 113.
 2 He indicated that the harassment, including the derogatory talking
 3 and the name calling, had continued. Id. at p. 114.

4 On October 11, 2007, Kincaid put Achenbach on a performance
 5 improvement plan as a result of recommendations by Stevens in her
 6 report. Deft Exh. 7 at pp. 11-12; Kincaid Depo. at pp. 39-40, 51.

7 On or about October 12, 2007, Kincaid met with Achenbach and
 8 plaintiff to discuss and outline plaintiff's duties as a ready mix
 9 loader at Linnton. Deft Exh. 7 at pp. 3, 4. A "duties list"
 10 outlined the specific responsibilities of the position. Id. at p.
 11 4. Gray stated that he and Kincaid discussed the meeting, although
 12 Gray did not attend. Gray Depo. at p. 35. The purpose of the
 13 meeting, according to Gray, was to clearly identify plaintiff's
 14 responsibilities. Id. He also noted that there had been some
 15 complaints that plaintiff had been lazy and unwilling to get off
 16 the loader. Id.; see also Stevens Depo. at p. 29 (Kincaid was to
 17 make sure plaintiff understood what his full responsibilities were
 18 as a loader-operator, so that there weren't any issues about what
 19 he was expected to do, which would include getting off the loader
 20 and helping with other things at the Linnton plant). Plaintiff
 21 stated that he was frustrated with Robertson issuing instructions
 22 to him and he believed that the meeting Kincaid held with Achenbach
 23 and plaintiff regarding plaintiff's job duties was to clarify with
 24 both of them what plaintiff's responsibilities were in light of
 25 this issue with Robertson. Pltf Depo. at pp. 131-32. Plaintiff
 26 appreciated Kincaid's attempt at this clarification. Id. at p.
 27 133.

28 On or about May 21, 2008, plaintiff got into a heated

1 discussion with his co-worker Castillo. Castillo Depo. at p. 35.
2 Castillo told plaintiff to "get his fat ass off the loader," and
3 plaintiff called Castillo a "wetback." Id. Nontavarnit witnessed
4 the incident. Id. Achenbach was either there or very close by
5 because Castillo states that Nontavarnit "was there, and then
6 [Achenbach] came out." Id. at p. 34. The incident was resolved at
7 the time and plaintiff and Castillo apologized to one another. Id.
8 at p. 36.

9 In the summer of 2008, plaintiff walked into the office at
10 the Linnton site and saw a picture of then presidential candidate
11 Barack Obama. Pltf Depo. at p. 138. As described by Campbell,
12 there were two pictures on one piece of paper. One was of a monkey
13 with Obama's face on it and the other was Obama in traditional
14 Middle Eastern style clothing, with a caption asking "do you want
15 this to be your president." Campbell Depo. at pp. 167-68
16 (describing two separate pictures); see also Pltf Depo. at pp. 138-
17 40 (describing seeing picture with Middle Eastern headdress and
18 indicating he saw only that one picture).

19 Plaintiff was frustrated and angry. Pltf Depo. at pp. 140-41.
20 He walked out of the room. Id. He does not know who put the
21 photos there. Id.

22 Plaintiff was terminated on November 14, 2008. Before he was
23 terminated, he was called into the office to meet with Gray and
24 Kincaid. Pltf Depo. at pp. 153-55. According to plaintiff, Gray
25 told him he was being "laid off or terminated, whatever." Id. at
26 p. 154. They met for ten to twenty minutes and plaintiff received
27 his last check. Id. They asked him to sign papers giving him an
28 additional two months of pay in exchange for a release. Id.

1 Plaintiff declined to sign the release because he had never been
 2 laid off from a job where he had been asked to sign a release or
 3 waiver of claims. Id. at pp. 154-55. It did not make sense to
 4 him. Id. at p. 155. Plaintiff contends that during the meeting,
 5 Gray said to Kincaid that Dave Bull, the president of the company,
 6 would be "glad to get this one," referring to plaintiff, to sign
 7 the release papers. Id. at p. 155.

8 The written termination notice lists "Laid Off" as the reason
 9 for the termination. Deft Exh. 7 at p. 7. It explains that
 10 plaintiff's position as the loader operator at Linnton was
 11 eliminated due to the slow economy. Id. Because he did not
 12 possess a commercial driver's license, a driver's position was not
 13 offered. Id. He was rated "average" in several work categories
 14 except for "quantity of work," in which he was rated "fair," and
 15 under "attitude," he was rated both "average" and "excel." Id.
 16 Defendant indicated it would re-employ plaintiff. Id.

17 STANDARDS

18 Summary judgment is appropriate if there is no genuine issue
 19 of material fact and the moving party is entitled to judgment as a
 20 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
 21 initial responsibility of informing the court of the basis of its
 22 motion, and identifying those portions of "'pleadings, depositions,
 23 answers to interrogatories, and admissions on file, together with
 24 the affidavits, if any,' which it believes demonstrate the absence
 25 of a genuine issue of material fact." Celotex Corp. v. Catrett,
 26 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

27 "If the moving party meets its initial burden of showing 'the
 28 absence of a material and triable issue of fact,' 'the burden then

moves to the opposing party, who must present significant probative evidence tending to support its claim or defense.''" Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991) (quoting Richards v. Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)). The nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex, 477 U.S. at 322-23.

The substantive law governing a claim determines whether a fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as to the existence of a genuine issue of fact must be resolved against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

If the factual context makes the nonmoving party's claim as to the existence of a material issue of fact implausible, that party must come forward with more persuasive evidence to support his claim than would otherwise be necessary. *Id.*; *In re Agricultural Research and Tech. Group*, 916 F.2d 528, 534 (9th Cir. 1990); *California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

DISCUSSION

Plaintiff's section 1981 claim has three parts: (1) disparate treatment, (2) hostile environment, and (3) retaliation. I address them in turn, before discussing the IIED claim.

/ / /

/ / /

1 I. Section 1981 Claim

2 A. Section 1981 Claims Generally

3 "Among other things, § 1981 guarantees 'all persons' the right
 4 to 'make and enforce contracts.'" Johnson v. Riverside Healthcare
 5 Sys., LP, 534 F.3d 1116, 1122 (9th Cir. 2008) (quoting 42 U.S.C. §
 6 1981(a)). "This right includes the right to the 'enjoyment of all
 7 benefits, privileges, terms, and conditions of the contractual
 8 relationship,' including the relationship between employer and
 9 employee." Id. (quoting section 1981(b)).

10 In the employment context, courts apply Title VII standards to
 11 section 1981 claims. See Manatt v. Bank of America, NA, 339 F.3d
 12 792, 797 (9th Cir. 2003) (the "legal principles guiding a court in
 13 a Title VII dispute apply with equal force in a § 1981 action").

14 A plaintiff may prevail on summary judgment by providing
 15 direct evidence of discrimination or by relying on circumstantial
 16 or indirect evidence and satisfying the burden-shifting framework
 17 of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas
 18 Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).
 19 See Cornwell v. Electra Cent. Credit Un., 439 F.3d 1018, 1028-30
 20 (9th Cir. 2006).

21 The burden-shifting framework requires the plaintiff to
 22 establish a prima facie case of unlawful discrimination followed by
 23 the defendant articulating a legitimate, nondiscriminatory reason
 24 for its action. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122
 25 n. 16 (9th Cir. 2004). If the defendant does so, the plaintiff
 26 must show that the articulated reason is a pretext for
 27 discrimination. Id.; Aragon v. Republic Silver State Disposal,
 28 Inc., 292 F.3d 654, 658-59 (9th Cir. 2002).

Defendant notes that the statute of limitations on section 1981 claims is four years. Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382-83 (2004); Thinket Ink Info. Resources, Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060-61 (9th Cir. 2004); 28 U.S.C. § 1658. Plaintiff filed this action on February 5, 2010.³ As a result, defendant states it is entitled to summary judgment on plaintiff's section 1981 claim to the extent it is based on events which occurred before February 5, 2006.

In National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002), the Supreme Court limited the use of the continuing violation theory in some contexts. The Court made an important distinction between disparate treatment discrimination and retaliation claims on the one hand, and hostile environment claims on the other. 536 U.S. at 115. "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." *Id.* "A hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Id.* at 117. Because a hostile environment claim "encompasses a single unlawful employment practice," the employee "need only file a charge within [the applicable limitations period] of any act that is part of the hostile work environment." *Id.* at 117, 119.

In contrast, discrete acts are incidents of discrimination, "such as termination, failure to promote, denial of transfer, or refusal to hire," that constitute a separate, actionable "unlawful

³ Plaintiff filed the case in state court on that date, and defendant later removed the action to this Court.

1 employment practice" and which are "not actionable if time barred,
2 even when they are related to acts alleged in timely filed
3 charges." Id. at 113, 114.

4 As discussed below, none of plaintiff's alleged adverse
5 employment actions occurred before February 5, 2006, so none of
6 them are time-barred. The alleged retaliatory termination also
7 occurred after that date, so it is similarly timely. As to the
8 hostile environment claim, because, as discussed below, the acts of
9 Wetten at the Waterview site are part of a pattern of conduct which
10 continued into the limitations period, none of the hostile
11 environment claim is time-barred.

12 B. Disparate Treatment Claim

13 To establish a prima facie case of race discrimination,
14 plaintiff must show (1) that he is African-American; (2) that he
15 performed his job adequately; (3) that he suffered an adverse
16 employment action; and (4) that similarly situated individuals
17 outside his protected class were treated differently. Cornwell,
18 439 F.3d at 1031.

19 There is no question that plaintiff is African-American.
20 Defendant does not challenge that plaintiff performed his job
21 adequately.

22 In his memorandum in opposition to the summary judgment
23 motion, plaintiff appears to raise five discrete adverse employment
24 actions taken against him: (1) subjection to habitual harassment
25 and discrimination by Achenbach, his supervisor, because of his
26 race; (2) working in conditions where he was subjected to racial
27 slurs and harassment by his co-workers; (3) knowledge by human
28 resources staff and management of the racial slurs and harassment

1 occurring at the workplace and allowing the atmosphere of racial
2 discrimination to continue; (4) being treated differently than his
3 non-African-American co-workers; (5) being terminated because of
4 his race. Pltf Resp. Mem. at p. 9.

5 I agree with defendant that the first three are not cognizable
6 as adverse employment actions. For the purposes of a
7 discrimination claim, an adverse employment action is one which
8 "materially affects the compensation, terms, conditions, or
9 privileges of employment." Davis v. Team Elec. Co., 520 F.3d 1080,
10 1089 (9th Cir. 2008) (internal quotation, brackets, and ellipsis
11 omitted); see also Kang v. U. Lim Am., Inc., 296 F.3d 810, 818-19
12 (9th Cir. 2002) (plaintiff established a prima facie case of
13 disparate treatment where the defendant subjected the plaintiff to
14 adverse employment actions including discriminatory overtime, and
15 termination, "that constituted a material change in the terms and
16 conditions of [the plaintiff's] employment") (internal quotation
17 omitted); Chuang v. University of Cal. Davis, Bd. of Trustees, 225
18 F.3d 1115, 1126 (9th Cir. 2000) (finding that "[t]he removal of or
19 substantial interference with work facilities important to the
20 performance of the job constitutes a material change in the terms
21 and conditions of a person's employment" and therefore qualifies as
22 an adverse employment action, but also finding that the employer's
23 failure to respond to grievances did not amount to an adverse
24 employment action because "it did not materially affect the
25 compensation, terms, conditions, or privileges of the [plaintiffs']
26 employment"); Kortan v. California Youth Auth., 217 F.3d 1104, 1113
27 (9th Cir. 2000) (no adverse employment action when the plaintiff
28 was not demoted, not stripped of work responsibilities, not handed

1 different or more burdensome work activities, not fired or
2 suspended, not denied any raises, and not reduced in salary or any
3 other benefit); Campos v. Portland Public Schs., No. 99-1744-MA,
4 2000 U.S. Dist. Lexis 21617, at *16-17 (D. Or. Nov. 9, 2000) (no
5 adverse employment action when plaintiff's job demotion was not
6 accompanied by any salary or status change or any indication that
7 her new position was less favorable).

8 As suggested in Morgan in the context of addressing the
9 continuing violation theory, a disparate treatment claim involves
10 discrete, tangible acts and thus, I agree with defendant that the
11 first three alleged adverse employment actions listed by plaintiff
12 are part of the hostile environment claim because habitual
13 harassment by Achenbach, being subjected to racial slurs and
14 harassment by co-workers, and management's failure to do anything
15 to address the situation are not discrete acts and do not, without
16 more, materially affect the compensation, terms, conditions, or
17 privileges of plaintiff's employment in a tangible way.

18 As for the termination allegation, I do not read plaintiff's
19 memorandum to suggest that the termination is a separate basis for
20 the disparate treatment claim because his argument regarding the
21 termination is that the termination was in retaliation for having
22 complained to Stevens about the racial slurs. Thus, I agree with
23 defendant that the allegations based on termination are properly
24 analyzed under the retaliation part of the section 1981 claim, not
25 as a disparate treatment claim.

26 Thus, for an adverse employment action, what remains is
27 plaintiff's allegation that he was treated differently than non-
28 African-American co-workers. To support this argument, plaintiff

1 identifies one discrete, tangible adverse employment action where
2 he was treated differently than a non-African-American employee:
3 receiving discipline for calling Castillo a "wetback," while
4 Caucasian employees, whom management knew also used racial slurs,
5 received no discipline. As described above, plaintiff received a
6 written warning as a result of his insult to Castillo. The
7 evidence shows that certain supervisory personnel knew about
8 Wetten's use of the words nigger, or nigger-head, or African
9 ingenuity, yet he received no written warning. Erwin also used the
10 term nigger-rigged and Gray did not discipline her when he learned
11 of the incident. Robertson and Achenbach apparently employed
12 certain slurs such as "beaner" (both Achenbach and Robertson), as
13 well as "wetback" and "spic" (Robertson), without written
14 discipline.

15 Plaintiff has raised material issues of fact with respect to
16 his treatment being different than Caucasian employees for the use
17 of racial slurs. But, the written warning he received is not an
18 adverse employment action under the law. One Ninth Circuit case
19 holds that a written warning placed in an employee's personnel file
20 can constitute an adverse employment action under certain
21 circumstances. Fonseca v. Sysco Food Servs. of Az., Inc., 374 F.3d
22 840, 848 (9th Cir. 2004). In Fonseca, the employee was initially
23 suspended for an incident, with the suspension then reduced to a
24 warning letter. Id. The Ninth Circuit held that the "warning
25 letter still constitutes an adverse employment action, particularly
26 since Sysco publicizes all discipline to all its employees." Id.
27 (citing Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987)
28 ("Transfers of job duties and undeserved performance ratings, if

1 proven, would constitute 'adverse employment decisions[.]'").

2 Fonseca, and the case on which it relied Yartzoff, are
 3 distinguishable from the instant case. First, unlike Fonseca,
 4 there is no evidence here that plaintiff's warning letter became
 5 public or was broadcast in any way to all other employees. Second,
 6 while Fonseca was not a retaliation case, Yartzoff, the case it
 7 cited for the proposition that a warning letter or negative review
 8 can be considered an adverse employment action, was a retaliation
 9 case. The concept of "adverse employment action" is more broadly
 10 construed in the retaliation context than in the substantive
 11 discrimination context in a disparate treatment claim. Burlington
 12 N. & Santa Fe Rwy Co. v. White, 546 U.S. 53, 60-63 (2006) (anti-
 13 retaliation provision of Title VII, unlike the substantive
 14 provision, is not limited to discriminatory actions that affect the
 15 terms and conditions of employment; defining adverse employment
 16 action for purposes of retaliation claims as an action that a
 17 reasonable employee would have found materially adverse, meaning
 18 action that "might have dissuaded a reasonable worker from making
 19 or supporting a charge of discrimination") (internal quotation
 20 omitted). Thus, Fonseca, the non-retaliation case, inappropriately
 21 cited to Yartzoff, the retaliation case, for the proposition that
 22 a warning letter with no material impact on the employee's working
 23 conditions, constitutes an adverse employment action in a disparate
 24 treatment claim.

25 Additionally, several cases in this district hold that a
 26 warning letter is not an adverse employment action. E.g., Hoang v.
 27 Wells Fargo Bank, N.A., 724 F. Supp. 2d 1094, 1104 (D. Or. 2010)
 28 (warning letter which affected no materially adverse change in the

1 terms and conditions of the plaintiff's employment was not an
 2 adverse employment action); Tudor Delcey v. A-Dec, Inc., No. CV-05-
 3 1728-PK, 2008 WL 123855, at *9 (D. Or. Jan. 9, 2008) (written
 4 warning was not an adverse employment action when it had no impact
 5 on the employee's status).

6 Here, the written warning plaintiff received for the racial
 7 slur to Castillo is not an adverse employment action. Because this
 8 is the only allegedly adverse action plaintiff cites in support of
 9 his disparate treatment claim, I grant summary judgment to
 10 defendant on that part of plaintiff's section 1981 claim.

11 C. Hostile Environment Claim

12 To establish a prima facie case for a hostile work environment
 13 claim, plaintiff "must raise a triable issue of fact as to whether
 14 (1) the defendants subjected [him] to verbal or physical conduct
 15 based on [his] race; (2) the conduct was unwelcome; and (3) the
 16 conduct was sufficiently severe or pervasive to alter the
 17 conditions of [his] employment and create an abusive working
 18 environment." Surrell v. California Water Serv. Co., 518 F.3d
 19 1097, 1108 (9th Cir. 2008).

20 Defendant argues that plaintiff fails to create an issue of
 21 fact as to whether the conduct was sufficiently severe or
 22 pervasive. I disagree.

23 First, the evidence is that Wetten regularly used the word
 24 "nigger" in some manner around plaintiff beginning in August 2005,
 25 at the inception of plaintiff's employment at Waterview, until
 26 plaintiff went on medical leave and left Waterview in December
 27 2006. This pattern of similar conduct continued into the post-
 28 February 5, 2006 limitations period, satisfying Morgan's conditions

1 for application of the continuing violation doctrine in a hostile
2 environment claim.

3 Examining the facts in a light most favorable to plaintiff,
4 the evidence is that Wetten regularly used the term "nigger" around
5 plaintiff, that he would apologize for using it at times, but would
6 resume using it again. Wetten admits he used the term around
7 plaintiff in the workplace. Plaintiff's testimony is that this
8 occurred regularly, more frequently than every other week. The
9 evidence is also that Wetten used the term "nigger-heads" when
10 referring to the rocks in the roadbed, and used, at least once, the
11 term "nigger-rigged," and referred to an attempt to fix
12 malfunctioning equipment as "African ingenuity."

13 Although there is a dispute in the record regarding whether
14 plaintiff's supervisor Russell and the Waterview site supervisor
15 Druery knew about Wetten's regular use of the term nigger,
16 plaintiff's testimony must be credited on summary judgment.
17 Plaintiff states that he reported the use of the word to Russell
18 and Druery, and, moreover, that Russell and Druery themselves heard
19 Wetten use the term. According to plaintiff, Russell and Druery
20 did nothing about it. Druery does admit to hearing Wetten use the
21 term "nigger-rigged," and then "African ingenuity," and other than
22 verbally warning Wetten, he issued no discipline.

23 In addition, plaintiff described hearing Henshaw state over
24 the radio that "Dave's black ass is going to work today." And,
25 Wetten testified that Henshaw used the word nigger around
26 plaintiff.

27 At Linnton, where plaintiff was transferred after his medical
28 leave, the specific evidence regarding use of the word "nigger"

1 shows less frequent use than by Wetten at Waterview. At Linnton,
2 plaintiff overheard Robertson and Achenbach using the word "nigger"
3 in reference to plaintiff only once, when he walked into the office
4 after hitting the batch office porch with the loader. But, Branson
5 told plaintiff that Branson had overheard Achenbach and Robertson
6 use the word nigger to refer to plaintiff and Campbell, although
7 there is no evidence showing that they did this in plaintiff's
8 presence. And, Castillo told plaintiff that he heard Achenbach or
9 Robertson use derogatory words towards plaintiff and Campbell,
10 including Achenbach referring to Campbell as a "stupid, fucking
11 nigger" when he had problems backing up a truck.

12 Erwin's episode using the term "nigger rigged" in the presence
13 of Campbell and another African-American employee, but not in
14 plaintiff's presence, also occurred at Linnton. Nontavarnit
15 testified that he heard Robertson use terms like wetback, spic, and
16 beaner, and had heard Achenbach use the term beaner. Additionally,
17 plaintiff saw the offensive pictures of then-candidate Obama.

18 In describing the evidence, defendant accurately describes the
19 events at Waterview, but minimizes the incidents at Linnton by
20 omitting any reference to Erwin's comment or to the evidence that
21 co-workers told plaintiff that Achenbach and Robertson referred to
22 him as nigger and used derogatory words toward plaintiff and
23 Campbell.

24 Defendant relies on a 1990 Ninth Circuit case to argue that
25 the evidence here falls short of suggesting a hostile environment.
26 In Sanchez v. City of Santa Ana, 936 F.2d 1027 (9th Cir. 1990), the
27 court affirmed a directed verdict in favor of the defendant on a
28 hostile environment claim where Hispanic police officers relied on

1 evidence that a racially offensive cartoon had been posted, there
2 had been use of racially offensive slurs, they had been assigned
3 unsafe vehicles, they were victims of selective enforcement of
4 police department rules and peer ostracism, they failed to receive
5 adequate police backup, and secret personnel files had been
6 maintained. Id. at 1031, 1037.

7 Moreover, defendant argues, the single time plaintiff
8 complained to human resources, defendant investigated the matter
9 and took corrective action to the extent it was needed. Thus,
10 defendant argues, the evidence in this case belies plaintiff's
11 claim that defendant condoned a hostile work environment.

12 But, as plaintiff notes, the use of the word "nigger" is
13 especially offensive. E.g., Swinton v. Potomac Corp., 270 F.3d
14 794, 817 (9th Cir. 2001) (the word "nigger" is "perhaps the most
15 offensive and inflammatory racial slur in English, . . . a word
16 expressive of racial hatred and bigotry") (internal quotation
17 omitted); Delph v. Dr. Pepper Bottling Co. of Paragould, Inc., 130
18 F.3d 349, 356 (8th Cir. 1997) (the "use of the word 'nigger,' even
19 in jest, can be evidence of racial antipathy") (internal quotation
20 omitted); McGinest, 360 F.3d at 1116 ("It is beyond question that
21 the use of the word 'nigger' is highly offensive and demeaning,
22 evoking a history of racial violence, brutality, and
23 subordination").

24 Without question, the conditions at Waterview at least create
25 a question of fact as to whether they were sufficiently severe or
26 pervasive to support a hostile environment claim under section
27 1981. No separate discussion of the conditions at Linnton is
28 required. Defendant brings only one motion, and the evidence

1 regarding what occurred at Waterview is enough to create an issue
2 of fact on this claim.

3 However, even if the events at Linnton were looked at
4 separately, I still deny summary judgment on that aspect of
5 plaintiff's claim. While the incidents at Linnton which plaintiff
6 personally observed are few (only two - hearing one reference by
7 Achenbach/Robertson to plaintiff as a "nigger" and the Obama
8 pictures), his testimony that his co-workers told him that
9 Achenbach and Robertson referred to plaintiff and Campbell as
10 niggers is unrebutted. While it is unclear from plaintiff's
11 testimony what plaintiff understood as to the frequency with which
12 Achenbach and Robertson used the term, the record establishes that
13 he had knowledge of its use. This, coupled with the two overtly
14 racial incidents, are enough for a reasonable factfinder to
15 conclude that the environment at either Waterville or Linnton was
16 severe or pervasive to be considered a hostile environment. My
17 conclusion takes into consideration the particular word "nigger,"
18 which, as indicated by the cases above, is so hostile and
19 antagonistic that very few uses are required to make the
20 environment severely hostile.

21 Additionally, the record, examined in the light most favorable
22 to plaintiff, shows that his complaint to Russell and Druery at
23 Waterville regarding Wetten's repeated use of "nigger" resulted in
24 no action against Wetten. And, when Druery did overhear Wetten use
25 the term "nigger-rigged," he issued an undocumented verbal warning
26 with no other repercussion. When Wetten subsequently used the term
27 "African ingenuity," Druery did nothing more than glare at Wetten.
28 Thus, the supervisory personnel at Waterville were unresponsive to

1 plaintiff's complaints.

2 At Linnton, a reasonable factfinder could conclude that
3 Stevens's investigation and recommendations were ineffective. At
4 least on summary judgment, when plaintiff states that he tried to
5 call her again, and also called Gray to complain about continued
6 harassment, it can be inferred that defendant's response to
7 plaintiff's August 2007 complaint was ineffective. While
8 plaintiff's deposition testimony regarding any specific incidents
9 of racial harassment that occurred after August 2007, is vague, the
10 evidence in the record regarding his need to call Stevens and Gray
11 subsequent to his August 2007 report and defendant's investigation,
12 because of what plaintiff perceived to be continuing harassment, is
13 unrebutted and suggests that defendant's "remedial measures" in
14 response to the August 2007 complaint were insufficient.

15 Finally, while the perpetrators of the offensive conduct were
16 different at each site, this action is against defendant who is
17 ultimately responsible for the conduct of all of its personnel.
18 Taking the evidence in a light most favorable to plaintiff, the
19 record is capable of showing that defendant tolerated a racially
20 hostile atmosphere at more than one location, that supervisors at
21 both sites either actually engaged in the offensive conduct
22 (Achenbach) or were aware of it (Druery, Russell), and yet the
23 conduct continued. This is sufficient, on summary judgment, to
24 show a pattern of similar conduct at both locations, making summary
25 judgment inappropriate whether the sites are considered singly or
26 together.

27 I deny the motion on the hostile environment claim.

28 / / /

1 D. Retaliation Claim

2 "Section 1981 prohibits 'racial discrimination in taking
3 retaliatory action.'" Surrell, 518 F.3d at 1108 (quoting Manatt,
4 339 F.3d at 798). To establish a prima facie case of retaliation,
5 a plaintiff must prove (1) he engaged in a protected activity; (2)
6 he suffered an adverse employment action; and (3) there was a
7 causal connection between the two. Id. at 1109. Once established,
8 the burden shifts to the defendant to set forth a legitimate,
9 non-retaliatory reason for its actions. Id. At that point, the
10 plaintiff must produce evidence to show that the stated reasons
11 were a pretext for retaliation. Id.

12 There is no dispute that plaintiff engaged in protected
13 activity by making a race discrimination complaint to Stevens in
14 August 2007. There is no dispute that he was terminated in
15 November 2008. The issue on summary judgment is the causal
16 connection between these two events.

17 Plaintiff may raise an inference of causation by demonstrating
18 a temporal proximity between the protected activity and any adverse
19 employment action, or, by demonstrating that the person making the
20 employment decision was aware that the person had engaged in the
21 protected activity. Villiarimo v. Aloha Island Air, Inc., 281 F.3d
22 1054, 1065 (9th Cir. 2001) ("causation can be inferred from timing
23 alone where an adverse employment action follows on the heels of
24 protected activity"); Yartzhoff, 809 F.2d at 1376 ("Causation
25 sufficient to establish the third element of the prima facie case
26 may be inferred from circumstantial evidence, such as the
27 employer's knowledge that the plaintiff engaged in protected
28 activities and the proximity in time between the protected action

1 and the allegedly retaliatory employment decision.").

2 The Ninth Circuit has rejected a bright line temporal
3 proximity test. Coszalter v. City of Salem, 320 F.3d 968, 977-78
4 (9th Cir. 2003) (noting that retaliation often follows quickly upon
5 the act that offended the retaliator, but that is not always so
6 because for a variety of reasons, some retaliators prefer to take
7 their time and may wait until the victim is especially vulnerable
8 or until an especially hurtful action is possible or until they
9 think the lapse of time disguises their true motivation).

10 Plaintiff notes that the decisionmakers in his termination
11 were Stevens, Kincaid, and Gray, all of whom knew about his
12 complaint of racial harassment. Although the time between his
13 complaint and his termination is about fifteen months, plaintiff
14 argues that in response to his complaint to Stevens, defendant
15 promptly, and for the first time, questioned his work ethic in an
16 attempt to establish the ground work for later laying him off. He
17 also contends that in September 2007, defendant began to make his
18 transfer to Linnton official, which, plaintiff contends, put him at
19 the bottom of the seniority list, resulting in his being laid off
20 before less senior employees.

21 1. Performance Issues

22 Plaintiff states that before his complaint to Stevens, he had
23 "met expectations" on his "hourly performance evaluations." He
24 cites to two performance evaluations. Pltf Exh. 9 at pp. 2, 5.
25 One of them is a performance review from July 2008, after his
26 August 2007 complaint to Stevens. Thus, it does not support his
27 position that before his August 2007 complaint to Stevens, he
28 received "met expectations" performance reviews.

1 The other, dated July 2007, does show that in the categories
2 of safety, attitude, quality, and productivity, plaintiff met
3 expectations. Id. at p. 2. In the written comments, as opposed to
4 the check boxes, plaintiff was told to "take more incentive in
5 keeping yard up and work harder at not overflowing bins." Id.
6 Plaintiff identified his own goals as wanting to improve his work
7 habits and relationships with other team members and to keep up on
8 safety requirements. Id.

9 Next, plaintiff points to the comments made in Stevens's
10 investigation summary where she notes that (1) there had been
11 miscommunications between Achenbach and plaintiff regarding leaving
12 at the end of the day, (2) Robertson and Achenbach believed
13 plaintiff was lazy and did not do enough clean up or maintenance
14 work, and only wanted to stay on the loader, despite having been
15 spoken to about doing the other work, and (3) Campbell noticed that
16 plaintiff did not get off the loader to do any labor and
17 maintenance and clean up work around the plant. Id. at p. 12.
18 Based on this, one of Stevens's conclusions was that "[plaintiff]
19 is concerned about losing his job at Linnton and this prompted his
20 complaint. There are legitimate concerns with [plaintiff's] work
21 performance. It is not up to full expectations." Id. One of
22 Stevens's recommended actions was to ensure that plaintiff
23 understood his job responsibilities included plant maintenance,
24 cleanup, and labor. Id.

25 Based on this, plaintiff argues that the evidence shows that
26 before making his complaint to Stevens, he had consistently met
27 expectations in all categories on his performance evaluations, but
28 after making the complaint, defendant began making accusations,

1 which began in Stevens's own report, that he was not performing his
2 job up to "full expectations."

3 I note that the July 2007 performance evaluation does indicate
4 that while plaintiff met expectations, there was a comment that he
5 needed to "take more incentive in keeping yard up and work harder
6 at not overflowing bins." Because it does not appear that either
7 Achenbach or Robertson were involved in issuing this performance
8 evaluation, it is safe to say that before plaintiff made his
9 complaint to Stevens, there was an issue with his failure to "keep
10 up the yard," which I understand to mean the general maintenance
11 and clean up which Achenbach and Robertson later complained about
12 to Stevens as part of her investigation.

13 Defendant also notes that while at Waterview, plaintiff had
14 received two verbal warnings, one for an unexcused absence and
15 another for unsafe operation of a truck. Pltf Depo. at pp. 54-56;
16 Exh. 3 to Second Schmidt Declr. at pp. 5, 6. In addition, at
17 Linnton, he received a verbal warning for damaging the porch of the
18 batch office with the loader. Pltf Depo. at pp. 76-80; Deft Exh.
19 7 at p. 2.

20 Defendant further notes that it is undisputed that Achenbach,
21 Robertson, and Campbell (himself African-American) told Stevens
22 during her investigation of plaintiff's complaint, that plaintiff's
23 job performance was lacking because he did not perform enough clean
24 up and maintenance. Thus, defendant argues that there is no
25 evidence to support plaintiff's theory that in response to his
26 complaint about racial slurs, Stevens immediately set out to find
27 fault with plaintiff's job performance.

28 Clearly, the reports by Achenbach and Robertson to Stevens

1 regarding plaintiff's poor work habits were made after plaintiff
2 complained about their treatment of him, and thus, considering the
3 evidence in a light most favorable to plaintiff, their statements
4 could have been made in retaliation for his complaint. However, as
5 noted above, there is evidence in the July 2007 evaluation, which
6 did not involve Achenbach and Robertson, that plaintiff had work
7 habit problems. And, Campbell, plaintiff's African-American co-
8 worker, also complained to Stevens about plaintiff.

9 Defendant also states that plaintiff's "met expectations" job
10 evaluation in July 2008 disproves his theory that defendant,
11 through Achenbach, Robertson, and Stevens, began a plot to
12 terminate plaintiff as soon as he complained about racial
13 harassment by noting performance problems. In July 2008, plaintiff
14 was again rated as "meets expectations" in the categories of
15 safety, attitude, quality, and productivity. Pltf Exh. 9 at p. 5.
16 In the comment section, he was told that he needed to work on not
17 overloading bins and to understand that "bin bleedover" affects the
18 quality of the concrete. Id. He was also expected to obtain his
19 commercial driver's license within a year, before his next
20 evaluation. Id. I agree with defendant that the "meets
21 expectations" July 2008 performance review undermines plaintiff's
22 theory.

23 In summary, the evidence shows that contrary to plaintiff's
24 argument, he had some noted performance problems before his
25 complaint to Stevens. The evidence also shows that an independent
26 African-American co-worker made the same complaint to Stevens
27 during the investigation of plaintiff's race harassment complaint,
28 lending some validation to Achenbach's and Robertson's complaints,

1 and creating doubt that those particular comments were motivated by
2 plaintiff's race harassment complaint. And, despite plaintiff's
3 argument about defendant laying the groundwork for his layoff with
4 poor performance comments immediately after his complaint, he
5 received a "meets expectations" performance evaluation subsequent
6 to his complaint. Thus, the evidence plaintiff relies on to
7 support his argument is quite slim.

8 This is a close question regarding what the evidence shows as
9 to plaintiff's race harassment complaint triggering negative
10 performance issues. There are some inferences to be made, but,
11 given the length of time between his complaint and his actual
12 layoff, and the fact that subsequent to his complaint he received
13 a meets expectation performance review, they are weak.
14 Nonetheless, given that Kincaid rated plaintiff's abilities in the
15 layoff document, conceded that he believed plaintiff had a poor
16 attitude compared with other Linnton employees, and was one of the
17 decisionmakers in plaintiff's termination decision, it is possible
18 that a factfinder could conclude that the seeds for plaintiff's
19 layoff were initially planted soon after his August 2007 complaint,
20 creating an issue of fact as to causation. Although sufficient to
21 survive summary judgment, I note that at trial, depending on how
22 the evidence comes in, a motion for judgment as a matter of law may
23 result in the dismissal of this claim before it is sent to a jury.

24 2. Reassignment

25 Plaintiff next argues that shortly after his racial harassment
26 complaint, the decisionmakers involved in his termination, all of
27 whom were aware of his complaint, began making plans to transfer
28 him or possibly lay him off, and that this shows causation.

1 Plaintiff points to an email from Kincaid, dated September 4,
 2 2007, to Gray and Stevens. Pltf Exh. 9 at pp. 14-15. There,
 3 Kincaid proposed sending plaintiff back to Waterview, under
 4 Druery's supervision. Id. Kincaid explained that plaintiff, upon
 5 returning from medical leave in February 2007, had been assigned to
 6 the Linnton site due to a temporary need for a loader operator
 7 there, created by the reassignment of the other Linnton loader
 8 operators to two, separate "portable projects." Id. One of those
 9 portable projects was closing on August 31, 2007, and the other one
 10 was going to close a few months later, with the employees due to
 11 return to the metro ready mix operations. Id. at p. 15.

12 Kincaid proposed sending plaintiff back to Waterview or to
 13 another site named Angell Quarry. He noted that Druery had
 14 indicated the move was okay with him, and that between Waterview
 15 and Angell Quarry, he would find work for plaintiff, with a last
 16 resort being a lay off. Id.

17 Then, Kincaid stated that

18 [i]n light of the recent events at Linnton RM involving
 19 [plaintiff, Achenbach, and Robertson,] I realize this
 20 move could be viewed incorrectly. The fact of the matter
 21 is that this move was the plan from the beginning. Both
 22 [plaintiff's and []] assignments at Linnton RM were
 23 *temporary assignments* for the benefit of the company as
 a whole to allow Ron [Trommlitz] to supervise the
 portable RM projects and also to allow for Jim Dumolt's
 retirement to proceed as requested. This is why neither
 was officially transferred from the Materials Group to
 the Metro RM Group.

24 To me this is the right move. However, due to recent
 25 events at Linnton RM, I would like your review and
 26 approval. I do not want to put our company at any
 unnecessary risk although this has been the planned
 transition since the beginning of the portable projects.

27 Id.

28 In the end, plaintiff was not moved back to Waterview. In his

1 deposition, Kincaid explained that based on a conversation with
2 Druery in which Druery stated that the position plaintiff had been
3 working at Waterview was now filled and Druery did not, in fact,
4 really have a place for plaintiff, Kincaid decided to have
5 plaintiff formally join the ready mix division in Linnton. Kincaid
6 Depo. at pp. 43-44. Based on a conversation with plaintiff that
7 plaintiff would get his commercial driver's license, Kincaid
8 believed defendant could use plaintiff in the ready mix division in
9 different capacities other than as a loader. Kincaid Depo. at pp.
10 43-44.

11 Thus, plaintiff was officially transferred to Linnton in
12 December 2007, where he had been working since February 2007. Pltf
13 Exh. 9 at p. 3. The actual transfer paperwork is dated December
14 17, 2007, and states that plaintiff was transferred from Waterview
15 to Linnton with the following conditions: (1) "[c]ompany date of
16 hire remains intact, new location seniority established upon
17 transfer"; (2) wages remained at \$17.97 per hour; (3) first full
18 performance evaluation to occur ninety days from transfer. Id.

19 Plaintiff contends that the official transfer to Waterview
20 caused him to lose all of his seniority which in turn, made him
21 first on the list to be laid off. Plaintiff states that absent the
22 transfer from Waterview to Linnton, there would have been at least
23 six employees with less seniority who would have been laid off
24 instead of plaintiff. Those employees are James Armspiger, Irv
25 Sisco, Mike Price, Ryan Shaw, John Connall, and Bruce Aberle. See
26 Pltf Exh. 9 at p. 17 ("crusher scorecard" showing list of nineteen
27 employees, including plaintiff, rated in five areas on a numerical
28 scorecard, and showing hire dates). Plaintiff states that

1 Armspiger and Price were both groundsmen like plaintiff, had been
 2 hired after plaintiff, and did not possess commercial drivers'
 3 licenses. Plaintiff contends that had he not been transferred,
 4 there would have been several other employees that would have been
 5 up for layoff consideration before plaintiff.

6 Plaintiff cites to two pages of defendant's employee handbook,
 7 effective October 1, 2008. Pltf Exh. 10. Assuming that this, or
 8 a similar version was in effect in December 2007 when plaintiff was
 9 transferred to Linnton, the transfer section states, in relevant
 10 part, that upon a transfer, "[d]epartment seniority will not pass
 11 with you. However, Knife River seniority for vacation, insurance,
 12 and profit-sharing will remain uninterrupted." Id. at p. 2
 13 (emphasis added).

14 In the "Anniversary" section, it is explained that

15 [t]he date of employment establishes an anniversary date.
 16 Your employment category and anniversary date determines
 17 your eligibility for group benefits. Length of service
 18 or seniority, together with your qualifications and
 abilities play an important role in helping us determine
 19 eligibility for promotion or transfer. Your relative
seniority standing and qualifications also enter into
decisions as to who will be laid off in a reduction of
work force and the order in which laid-off personnel are
 20 called back to work.

21 Your seniority is broken in these circumstances:

- 22 ■ Termination of employment for any reason.
- 23 ■ Continuous absence from work for more than six
 (6) consecutive months due to layoff.
- 24 ■ Failure to return to work when recalled following
 a layoff.
- 25 ■ Failure to return to work immediately following
 a doctor's release to return after any work related
 or non-work related injury or illness.

26 The years of service you acquire in your employment are
 27 important. Knife River hopes that you will recognize
 their value and that you will not act in such a way as to
 28 lose them without careful thought and good reason on your
 part.

1 Id. at p. 3 (emphasis added).

2 The "anniversary" section suggests that the date of employment
3 is the date used for determining seniority for lay off purposes.⁴
4 Plaintiff's transfer to Linnton does not fall under any of the four
5 events which cause an employee's seniority to be broken, suggesting
6 that his hire date did not change for seniority purposes when he
7 was transferred.

8 However, there is no explanation of the meaning of "department
9 seniority" which does not pass with the employee upon a transfer.
10 Thus, the handbook is ambiguous. Although the timing of the August
11 2007 racial discrimination complaint is pretty far removed from the
12 November 2008 termination, there are issues of fact regarding the
13 seniority issue. Plaintiff's official reassignment to Linnton
14 occurred in December 2007, within the window of time which allows
15 an inference of causation. The handbook is unclear what
16 "department seniority" is and without an explanation of that in the
17 record, plaintiff's theory that the reassignment set him up to be
18 first in line for layoff, is a reasonable inference.

19 Additionally, as plaintiff notes, the decisionmakers for the
20 transfer were aware of his race discrimination complaint, and Gray
21 allegedly told Kincaid that Bull was going to be glad to obtain the
22 waiver from plaintiff. This is enough to create an issue of fact
23 on causation based on plaintiff's seniority theory. Again,

24 ⁴ Remarkably, defendant states that "[m]ore importantly,
25 however, is the absence of any evidence in the record that
26 seniority is even a factor that Knife River takes into
27 consideration in determining which employees to terminate during
28 a reduction in force. This is perhaps the most glaring of all
Deft Reply Mem. at p. 13.

1 however, I consider the causation evidence to be fairly weak and
2 the totality of the evidence at trial may suggest a different
3 result.

4 In summary on the section 1981 claim, I grant the motion as to
5 the disparate treatment part of the claim, but I deny the motion on
6 the hostile environment and retaliation claims.

7 II. IIED Claim

8 To sustain an IIED claim, plaintiff must show that defendant
9 intended to inflict severe emotional distress, that defendant's
10 acts were the cause of plaintiff's severe emotional distress, and
11 that defendant's acts constituted an extraordinary transgression of
12 the bounds of socially tolerable conduct. McGanty v. Staudenraus,
13 321 Or. 532, 563, 901 P.2d 841, 849 (1995); see also Babick v.
14 Oregon Arena Corp., 333 Or. 401, 411, 40 P.3d 1059, 1063 (2002) (to
15 state an IIED claim under Oregon law, plaintiff must prove, inter
16 alia, that defendants' actions "constituted an extraordinary
17 transgression of the bounds of socially tolerable conduct.")
18 (internal quotation omitted).

19 As a result of some clarification in plaintiff's response
20 memorandum, it appears that plaintiff bases his claim on certain
21 acts by Achenbach and Robertson at the Linnton plant, for which
22 defendant is vicariously liable. The actions are (1) the May 18,
23 2007 incident when plaintiff overheard Achenbach and/or Robertson
24 use the word "nigger" in referring to plaintiff; (2) the reports by
25 co-workers that they overheard Achenbach and Robertson use the word
26 "nigger" in reference to plaintiff and Campbell; (3) that Achenbach
27 and Robertson wanted to get rid of plaintiff because he was
28 African-American.

1 Defendant first notes that the statute of limitations is two
2 years for the IIED claim, making any incidents before February 5,
3 2008, not actionable. Or. Rev. Stat. § 12.110(1). Accordingly, I
4 agree with defendant that the May 2007 reference by Achenbach or
5 Robertson to plaintiff as a nigger, which plaintiff overheard, is
6 not a part of this claim.

7 Second, defendant argues that the evidence does not support
8 either the intent or outrageous elements. With the May 2007
9 comment by Achenbach or Robertson considered untimely, there is no
10 evidence in support of the IIED claim showing that plaintiff
11 himself heard either Achenbach or Robertson use the word "nigger,"
12 meaning there is no evidence that the epithet was ever directed at
13 plaintiff in his presence within the actionable time period.
14 Plaintiff did not witness the incidents his co-workers told him
15 about. Thus, even assuming that Achenbach and Robertson made the
16 comments attributed to them by plaintiff's co-workers, they did so
17 outside of plaintiff's presence. This, defendant argues, fails to
18 show that Achenbach and Robertson intended to cause plaintiff
19 severe emotional distress.

20 I agree. Intent is defined to mean "where the actor desires
21 to inflict severe emotional distress, and also where he knows that
22 such distress is certain, or substantially certain, to result from
23 his conduct." McGanty, 321 Or. at 550, 901 P.2d at 853 (internal
24 quotation and emphasis omitted). I do not question the offensive,
25 inflammatory, and demeaning nature of the term "nigger." Nor will
26 I quibble here over whether anger, anxiety, fear, depression, or
27 any particular variety of emotional distress is or is not the sort
28 to support this element of the tort. However, the defendant must

1 intend to cause the plaintiff emotional distress, and that the
2 distress be severe.

3 Comments made outside of plaintiff's presence fail to show
4 that Achenbach or Robertson intended to cause plaintiff emotional
5 distress or that they were certain or substantially certain that
6 such use of the term would cause plaintiff severe emotional
7 distress. In other cases analyzing an Oregon IIED claim where the
8 use of racial or sexual slurs has occurred, the comments have been
9 directed at the victim in his or her presence, and there has been
10 other offensive conduct as well. E.g., Whelan v. Albertson's,
11 Inc., 129 Or. App. 501, 504-06, 879 P.2d 888, 891 (1994)
12 (plaintiff's supervisor and co-worker repeatedly referred to
13 plaintiff as "queer" and imitated his allegedly effeminate
14 characteristics in front of plaintiff and other employees,
15 plaintiff's supervisor asked plaintiff if he had "fucked" a woman
16 he dated, the plaintiff's co-worker called plaintiff a "fucking
17 queer asshole," and the co-worker shoved the plaintiff hard in the
18 chest, among other things); Lathrope-Olson v. Department of
19 Transp., 128 Or. App. 405, 408, 876 P.2d 345, 347 (1994) (when
20 defendant's overtly racist and sexual comments were directed to
21 plaintiff and defendant engaged in other acts of psychological and
22 physical intimidation, summary judgment to employer was improper);
23 Franklin v. Portland Comm. College, 100 Or. App. 465, 467, 469-72,
24 787 P.2d 489, 490, 491-83 (1990) (supervisor's use of racial
25 epithet "boy," directed to African-American employee, along with
26 issuing false reprimands, attempting to lock him in an office, and
27 suggesting that he apply for a different job with another employer,
28 were enough to show continual verbal and physical harassment such

1 that, if proven, the plaintiff could show that the supervisor had
2 the specific intent to cause the plaintiff severe emotional
3 distress). Without more, racially charged comments about
4 plaintiff, not made in his presence, fail to create an issue of
5 fact on the intent element of the IIED claim.

6 As to the other allegation regarding Achenbach's and
7 Robertson's desire to "get rid" of plaintiff, defendant initially
8 challenges the admissibility of the evidence supporting this
9 allegation, and then argues that even considering it, it does not
10 support plaintiff's claim. I address the evidentiary objection in
11 a separate section of this Opinion. However, even considering the
12 evidence, I agree with defendant.

13 There are two pieces of evidence plaintiff relies on to
14 support his contention that Achenbach and Robertson wanted to get
15 rid of him because he is African-American. First is an October 6,
16 2009 letter written by Robertson after his termination in which he
17 writes "To Whom it May Concern," and takes issue with Achenbach's
18 role as a supervisor. Pltf Exh. 9 at pp. 6-7. He states that
19 Achenbach "abused his position in the [company] against co-workers
20 under his supervision. Id. Robertson states that he could recall
21 "one specific incident, when [Achenbach] asked me to provoke other
22 co-workers of a specific race into losing their jobs." Id.

23 The other piece of evidence is a statement by African-American
24 employee Ratcliff during Stevens's investigation into a race
25 discrimination complaint by Campbell against Achenbach. Ratcliff
26 told Stevens that Ratcliff had "NEVER heard [Achenbach] say
27 anything discriminatory 1st hand, but . . . Joe Robertson told
28 [Ratcliff] that [Achenbach] said that he wanted to get rid of

1 [plaintiff] first, [Campbell] second, and [Ratcliff] third.
2 [Ratcliff] was not sure that this was true, but it if was, it would
3 be suspicious since they were all three black." Pltf Exh. 9 at p.
4 11.

5 I note that first, neither piece of evidence implicates
6 Robertson as desiring to get rid of plaintiff, for any reason. Any
7 ill motive is alleged to have been held by Achenbach only. Second,
8 again, the evidence is that Achenbach shared certain feelings with
9 Robertson about a desire to get rid of certain employees. Neither
10 statement attributed to Achenbach includes any overt racial
11 reference or slur, and, even if one can be inferred, the statements
12 were not made directly to plaintiff. Without more, the evidence is
13 not capable of allowing a reasonable factfinder to conclude that
14 Achenbach intended to cause plaintiff severe emotional distress or
15 was certain, or substantially certain, such distress would occur
16 because of Achenbach's conduct. Assuming Achenbach wanted
17 plaintiff gone from the work place is not the same as inferring
18 that he intended to cause plaintiff severe emotional distress.

19 I grant summary judgment to defendant on the IIED claim.

20 III. Evidentiary Objections

21 Defendant objects to the admission of Robertson's October 6,
22 2009 letter, and Ratcliff's statements to Stevens during her
23 investigation of Campbell's race harassment complaint.

24 I did not consider the evidence in regard to the section 1981
25 claim, and even considering it as part of the IIED claim, I grant
26 defendant's motion. Thus, it is unnecessary to resolve the
27 evidentiary objections.

28 However, I note that with both exhibits, plaintiff ultimately

1 relies on Federal Rule of Evidence 801(d)(2)(D) to argue that the
 2 statements attributed to Achenbach by Robertson in his letter, or
 3 by Ratcliff in his statements to Stevens, are admissible as
 4 statements of a party's agent concerning a matter within the scope
 5 of the agency or employment, made during the existence of the
 6 employment relationship.

7 The proponent of allegedly non-hearsay evidence consisting of
 8 a statement by a party's agent, has the burden to demonstrate the
 9 foundational requirement that the statement related to a matter
 10 within the scope of the witness's agency or employment. United
 11 States v. Chang, 207 F.3d 1169, 1176 (9th Cir. 2000). Facts
 12 regarding the agent's duties are clearly relevant to the analysis.
 13 See, e.g., Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041, 1045-46
 14 (9th Cir. 1999) (analyzing facts regarding scope of agency); City
 15 of Long Beach v. Standard Oil Co. of Calif., 46 F.3d 929, 937 (9th
 16 Cir. 1995) (affirming exclusion of agent's statements because of
 17 proponent's failure to include in the record any evidence regarding
 18 agent's role in company).

19 Here, plaintiff fails to create a record supporting the
 20 admission of Achenbach's statements under Rule 801(D)(2)(d). There
 21 is no evidence regarding Achenbach's job description, his actual
 22 duties, or his authority to fire employees. Without such
 23 information, the record does not show that the statements
 24 attributed to him concerned a matter within the scope of his
 25 agency.

26 CONCLUSION

27 Defendant's summary judgment motion [20] is granted as to the
 28 disparate treatment section 1981 claim, is denied as to the other

1 bases of the section 1981 claim, and is granted as to the IIED
2 claim.

3 IT IS SO ORDERED.

4 Dated this 8th day of March, 2011

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6
7 /s/ Dennis James Hubel
8 Dennis James Hubel
United States Magistrate Judge
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